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11 ASSOCIATION OF AMERICAN RAILROADS and
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RAILROAD ASSOCIATION

12 UNITED STATES DISTRICT COURT
13 EASTERN DISTRICT OF CALIFORNIA
14 SACRAMENTO DIVISION

15 ASSOCIATION OF AMERICAN
RAILROADS and AMERICAN SHORT LINE
16 AND REGIONAL RAILROAD
ASSOCIATION,

17 Plaintiffs,

18 v.

19 LIANE M. RANDOLPH, in her official
capacity as Chair of the California Air
Resources Board; JOHN EISENHUT, SUSAN
20 SHAHEEN, JOHN R. BALMES, DIANE
TAKVORIAN, BILL QUIRK, DEAN
21 FLOREZ, HECTOR DE LA TORRE,
DAVINA HURT, V. MANUEL PEREZ, ERIC
22 GUERRA, NORA VARGAS, TANIA
PACHECO-WERNER, GIDEON KRACOV,
23 HENRY STERN, and EDUARDO GARCIA,
in their official capacities as members of the
California Air Resources Board; STEVEN S.
24 CLIFF, in his official capacity as Executive
Officer of the California Air Resources Board;
25 and ROB BONTA, in his official capacity as
Attorney General of the State of California

26
27 Defendants.

28 Case No. 2:23-cv-01154-JAM-JDP
**MEMORANDUM OF POINTS AND
AUTHORITIES IN SUPPORT OF
PLAINTIFFS' MOTION FOR
PRELIMINARY INJUNCTION**

Date: August 1, 2023
Time: 1:30 p.m.
Courtroom: 6 (14th Floor)
Judge: Hon. John A. Mendez

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INTRODUCTION

2 This lawsuit challenges a state agency’s brazen disregard of clear limits on its authority. For
3 the first time in its 56 years of existence, the California Air Resources Board (“CARB” or “Agency”)
4 has adopted regulations that target railroad operations in the State and seek to dictate emissions
5 standards for locomotives that will operate in and outside the State of California. The regulation,
6 entitled the “In-Use Locomotive Regulation” (the “Regulation”), is plainly preempted by federal
7 law under Ninth Circuit precedent. And the burden the Regulation will impose on members of
8 Plaintiffs the Association of American Railroads (“AAR”) and the American Short Line and
9 Regional Railroad Association (“ASLRRA”) is immense, amounting to more than a *billion* dollars
10 in compliance costs and diverted resources every year. The Regulation will take effect on October
11 1, 2023, and the burdens on railroad operators are already being felt *now*, as Plaintiffs’ members
12 must, among other things, begin investing millions of dollars to develop and install new technology
13 to comply with the Regulation’s onerous reporting requirements. An immediate injunction is thus
14 needed to preserve the status quo and spare Plaintiffs’ members from suffering irreparable harm.

15 CARB was formed in 1967. Before now, it had *never* imposed regulations targeting
16 locomotive emissions or railroad operations. This half-century of regulatory forbearance is no
17 accident. Recognizing the inherently interstate nature of railroad operations, Congress has passed
18 multiple laws that broadly preempt state and local regulations targeting railroads. These broadly
19 preemptive federal laws ensure that interstate commerce will not be burdened by a patchwork of
20 competing state standards. For example, the Interstate Commerce Commission Termination Act of
21 1995 (“the ICCTA”) provides a federal agency (the Surface Transportation Board) with “exclusive
22 jurisdiction over a wide range of state and local regulation of rail activity.” *BNSF Ry. Co. v. Cal.*
23 *Dep’t of Tax & Fee Admin.*, 904 F.3d 755, 760 (9th Cir. 2018) (citations omitted). Under the
24 ICCTA, “state laws that may reasonably be said to have the effect of managing or governing rail
25 transportation” are categorically preempted. *Id.* (citations omitted). Similarly, the Clean Air Act
26 forbids state regulators from adopting or trying to enforce “any standard or other requirement
27 relating to the control of emissions from … [n]ew locomotives or new engines used in locomotives.”
28 42 U.S.C. § 7543(e)(1). In light of these and other preemptive federal laws, CARB recognized (until

1 recently) that directly regulating railroad operations was a non-starter. Thus, in 2005, CARB
 2 conceded that it likely lacked authority to issue rules “specifically designed to reduce emissions
 3 from railroad locomotives” because state regulators may not dictate how “railroads are permitted to
 4 use and operate” their locomotive fleets. Compl., Ex. 4 at 16; *see id.* at 27-28.

5 Nothing since 2005 has changed to expand CARB’s authority over railroad operations. The
 6 opposite is true: the Ninth Circuit reconfirmed the broad preemptive scope of federal law in this
 7 area, striking down regulations by the South Coast Air Quality Management District (“South Coast”)
 8 that targeted railroads. In *Association of American Railroads v. South Coast Air Quality*
 9 *Management District*, 622 F.3d 1094 (9th Cir. 2010), the Ninth Circuit held that South Coast’s
 10 regulation of locomotive “idling” and related record-keeping and reporting requirements were
 11 “plainly” preempted by the ICCTA. *Id.* at 1098. As the court explained, the “ICCTA preempts
 12 [state] rules unless they are rules of general applicability that do not unreasonably burden railroad
 13 activity,” nullifying state rules that “apply exclusively and directly to railroad activity.” *Id.*

14 The Regulation flouts this binding precedent. Inexplicably, it includes rules on train idling
 15 (§ 2478.9) and imposes record-keeping and reporting obligations (§ 2478.11) that mirror the
 16 regulations the Ninth Circuit held were “plainly” preempted. *Id.* Even more remarkably, the
 17 Regulation goes *substantially further* than South Coast attempted, inserting state regulators directly
 18 into the management of rail operations. The Regulation’s so-called “Spending Account” provision
 19 (§ 2478.4) effectively charges railroads for operating in the State, compelling Plaintiffs’ members
 20 to deposit *billions* of dollars in accounts that can only be used for certain CARB-approved purchases,
 21 including zero-emissions technology that is unlikely to be available anytime soon. As a result,
 22 CARB’s views on investment priorities supplant the railroads’ own judgments regarding their
 23 privately owned infrastructure and equipment. The “In-Use Operational Requirements” (§ 2478.5),
 24 in turn, make it unlawful for Plaintiffs’ members to use locomotives in California that are federally
 25 certified but that CARB deems too old, while also dictating (after a phase-in period) that new
 26 locomotives will need to operate in a “zero emissions configuration.” In adopting these rules, CARB
 27 has not hidden the scope of its ambition: the Agency expects that Class I operators (e.g., Union
 28 Pacific Railroad and BNSF Railway) will transform “their entire line haul locomotive fleet” on a

1 *national* basis to comply with CARB’s mandates. Compl., Ex. 6 at 88.

2 Plaintiffs have a high likelihood of success because the Regulation, among other flaws, is
3 preempted by several federal statutes, including the ICCTA, 49 U.S.C. § 10101, *et seq.*, and the
4 Clean Air Act, 42 U.S.C. § 7041, *et seq.* The Regulation also violates the Dormant Commerce
5 Clause by imposing substantial burdens on interstate transportation. Equitable factors also strongly
6 favor a preliminary injunction. Absent immediate injunctive relief, Plaintiffs will suffer irreparable
7 harm even before the Regulation’s effective date. To comply with the Regulation’s reporting
8 requirements as of that date, Plaintiffs’ members must begin to purchase and install expensive,
9 unwanted, and unnecessary new technology. They must also divert capital into Spending Accounts,
10 preventing railroads from making investments in their operations that do not align with CARB
11 mandates. The resulting losses will be highly disruptive and *per se* irreparable. The Regulation is
12 also likely to force some smaller operators out of business, a quintessential example of irreparable
13 harm. The balance of hardships and public interest likewise tip sharply in favor of enjoining the
14 Regulation. As courts have recognized, the public interest weighs against the enforcement of
15 preempted or unconstitutional laws. And because the Regulation would substantially burden both
16 intrastate and interstate railroad operations, allowing it to go into effect would impose tremendous
17 costs not only on railroads but also on railroad customers and the general public.

18 CARB has tried to justify the Regulation as needed to achieve emissions reductions that will
19 improve ambient air quality and further the State’s climate goals. Plaintiffs and their members share
20 those objectives, and have made significant investments to upgrade their technology and
21 infrastructure to enhance air quality by reducing criteria pollutant and greenhouse gas emissions.
22 “But our system does not permit agencies to act unlawfully even in pursuit of desirable ends.”
23 *Alabama Ass’n of Realtors v. HHS*, 141 S. Ct. 2485, 2490 (2021) (per curiam). The Regulation is
24 unlawful because it seeks to have a state agency dictate central aspects of railroad operation and
25 locomotive design in clear defiance of federal law. The Court should thus grant the motion for a
26 preliminary injunction. Plaintiffs respectfully urge the Court to act on their motion as promptly as
27 is practicable, because Plaintiffs’ members need guidance on their legal obligations in advance of
28 the Regulation’s expected October 1, 2023 effective date.

BACKGROUND

I. Railroad operations are subject to exclusive federal regulation.

The freight rail industry in the United States is a single interconnected system of six Class I railroads and hundreds of short line railroads that together own and maintain nearly 140,000 route-miles of track.¹ Class I railroads do not have state-specific fleets; they “have a national fleet.” Compl., Ex. 6 at 129; *see also* Compl., Ex. 7 at 12 (“For Class I railroads, 72 percent of the nationwide line haul locomotives visit California in any given year.”); Declaration of BNSF Railway (“BNSF Decl.”) ¶ 15 (approximately 98% of the BNSF locomotive fleet that operates in California could also operate in any other state on any given day); Declaration of Union Pacific (“UP Decl.”) ¶ 13 (approximately 90% of the Union Pacific high-horsepower locomotive fleet touched California at least once during 2022). At any given time, approximately 5% to 10% of line-haul locomotives operated by the six Class I railroads are owned or leased by another railroad.² This “locomotive run-through interoperability” means that line-haul locomotives from railroads in the United States, Canada, and Mexico commonly operate far from the tracks of the railroad that owns the locomotives. For example, although BNSF operates in 28 states, its locomotives can be found anywhere in the United States. BNSF Decl. ¶ 15. Thus, as CARB recognized, all North American railroads must be prepared to have their *entire fleet* “operate as needed in California.” Compl., Ex. 2 at 177.

18 “Owing to its interstate nature, the railroad industry has long been subject to extensive and
19 often exclusive federal regulation.” *Nat'l R.R. Passenger Corp. v. Su*, 41 F.4th 1147, 1150 (9th Cir.
20 2022); *see also United Transp. Union v. Long Island R.R.*, 455 U.S. 678, 688 (1982) (“[T]he Federal
21 Government has determined that a uniform regulatory scheme is necessary to the operation of the
22 national rail system.”). For purposes of this motion, two statutes are directly relevant.

23 **The ICCTA:** The ICCTA grants a federal agency (the Surface Transportation Board or
24 “STB”) exclusive jurisdiction over, as relevant here, “transportation by rail carriers, and the

¹ The Surface Transportation Board (“STB” or “Board”) classifies railroad carriers as either Class I, Class II, or Class III, based on an annual review of their revenue. There are currently six Class I freight railroads in the United States, including BNSF Railway and Union Pacific. Class II and Class III railroads are often referred to as “short line railroads.” See Compl. ¶¶ 17, 18, 29, 46, 76.

²⁸ ² A “line-haul locomotive” is a locomotive that is “powered by an engine with a maximum rated power (or a combination of engines having a total rated power) of greater than 2300 horsepower. See 40 C.F.R. § 1033.901.

1 remedies provided ... with respect to rates, classifications, rules ... practices, routes, services, and
 2 facilities of such carriers.” 49 U.S.C. § 10501(b). “Transportation” under the ICCTA is defined in
 3 sweeping terms to cover “a locomotive, car, vehicle, vessel, warehouse, wharf, pier, dock, yard,
 4 property, facility, instrumentality, or equipment of any kind related to the movement of passengers
 5 or property, or both, by rail,” and “services related to that movement.” *Id.* § 10102(9)(A), (B).
 6 Taking these provisions together, “it is difficult to imagine a broader statement of Congress’s intent
 7 to preempt state regulatory authority over railroad operations.” *BNSF Ry. Co.*, 904 F.3d at 760
 8 (quotation marks and emphasis omitted). As the legislative history shows, Congress deliberately
 9 excluded state regulation in this area because “[s]ubjecting rail carriers” to any variation in state
 10 regulations “would greatly undermine the industry.” S. Rep. No. 104-176, at 6 (1995). Congress
 11 thus prioritized “the uniformity of Federal standards” and sought to avoid any “risk [of]
 12 balkanization and subversion of the Federal scheme.” H.R. Rep. No. 104-311, at 96 (1995).

13 **The Clean Air Act:** The Clean Air Act requires the U.S. Environmental Protection Agency
 14 (“EPA”) to “promulgate regulations containing standards applicable to emissions from new
 15 locomotives and new engines used in locomotives.” 42 U.S.C. § 7547(a)(5). Exercising that
 16 authority, EPA has promulgated comprehensive standards and other regulations governing
 17 locomotive emissions. *See* 40 C.F.R. pt. 1033, subpart B. These regulations employ a tier system
 18 for locomotives, with Tier 0 locomotives having the oldest “original manufacture” date—and thus
 19 the most lenient emission standard—while Tier 4 locomotives are the newest locomotives and have
 20 the strictest emission standard. *See id.* § 1033.101. These emission standards apply to “new”
 21 locomotives during their “useful life,” which is a period specified by the manufacturer in both years
 22 (a minimum of 10) and megawatt-hours; the useful life period lasts until either the specified years
 23 or megawatt-hours are exceeded or until the locomotive is remanufactured. *Id.* § 1033.101(g). In
 24 addition, EPA has interpreted the term “new” with respect to locomotives and locomotive engines
 25 to include “remanufactured or re-furbished” ones. *Id.* §§ 1033.901, 1074.5. Thus, a locomotive that
 26 has been remanufactured (or has a remanufactured engine) is subject to the EPA’s emissions
 27 regulations during an additional useful-life period. *Id.* § 1033.101(g)(3)-(4).

28 Congress directed that EPA’s authority over locomotive emissions is exclusive. Section

1 209(e)(1) of the Clean Air Act provides that “[n]o State or any political subdivision thereof shall
 2 adopt or attempt to enforce any standard or other requirement relating to the control of emissions
 3 from … [n]ew locomotives or new engines used in locomotives.” 42 U.S.C. § 7543(e)(1). This
 4 provision has long been understood to preempt emission regulations of locomotives even after they
 5 are no longer “new,” since in-use emission rules create *de facto* standards for new locomotives that
 6 would subvert Congress’s directive. *See In re Volkswagen “Clean Diesel” Mktg., Sales Pracs., &*
 7 *Prods. Liab. Litig.*, 959 F.3d 1201, 1218–19 (9th Cir. 2020); *Engine Mfrs. Ass’n v. U.S. E.P.A.*, 88
 8 F.3d 1075, 1082–83, 1086 (D.C. Cir. 1996) (applying this reasoning in the case of nonroad engines
 9 subject to preemption under section 209(e)(1)); 62 Fed. Reg. 6366, 6397 (Feb. 11, 1997) (applying
 10 this rule to locomotives). In addition, even with respect to “non-new” locomotives and engines,
 11 “§ 209(e)(2) creates a sphere of implied preemption” of any state regulation relating to emissions
 12 control until the state receives express authorization from EPA under a waiver process. *Pac. Merch.*
 13 *Shipping Ass’n v. Goldstene*, 517 F.3d 1108, 1113 (9th Cir. 2008); Final Rule, *Emission Standards*
 14 *for Locomotives and Locomotive Engines*, 63 Fed. Reg. 18978, 18994 (Apr. 16, 1998) (“all state
 15 requirements relating to the control of emissions from in-use locomotives and locomotive engines
 16 … are subject to section 209(e)(2)’s waiver requirement”).

17 **II. CARB departs from its historic practices to directly regulate railroad operations and**
 18 **locomotive emissions by adopting the Regulation.**

19 Over its 55-year history, CARB has imposed rules regulating cars, trucks, and buses—but
 20 not locomotives. That is no oversight. To the contrary, recognizing the limits on state authority in
 21 this area, CARB historically sought to work cooperatively with the railroad industry to achieve
 22 emissions reductions in a manner that was both practical and consistent with the law. Plaintiffs and
 23 their members have been part of those efforts. Thus, in 1998 and 2005, CARB entered into voluntary
 24 agreements with several AAR members operating in California to control emissions from
 25 locomotives. Those agreements, which the members fully honored, resulted in significant
 26 environmental benefits. Compl. ¶ 71. In addition, railroads have undertaken their own initiatives
 27 to pioneer technology investments and change operations to limit emissions impacts. *See id.*

28 Notably, at the time it entered the 2005 agreement, CARB rejected comments urging the

1 Agency to abandon cooperation in favor of direct regulation. CARB explained that regulation was
 2 not a viable path because “the ICCTA basically protects the railroads from any regulation … that
 3 has a potential economic impact on railroad operations” and would “very likely” preempt state
 4 regulations “specifically designed to reduce emissions from railroad locomotives” that “affect how
 5 the railroads are permitted to use and operate those locomotives.” Compl., Ex. 4 at 16, 27-28.
 6 CARB’s legal analysis was confirmed by subsequent events. One of California’s air quality
 7 management districts (South Coast) opposed the 2005 agreement and chose to issue its own
 8 regulations “aimed at railroad operations in facilities in the District.” *AAR v. S Coast Air Quality*
 9 *Mgm’t Dist.*, 2007 WL 2439499, at *3 (C.D. Cal. Apr. 30, 2007). As described above, p. 2, *supra*,
 10 South Coast imposed regulations to “limit idling of unattended locomotives” and require railroads
 11 to prepare “emissions inventory reports.” *Id.* The district court held that “the [r]ules at issue …
 12 [were] exactly the type of local regulation Congress intended to preempt by enacting the ICCTA in
 13 order to prevent a ‘patchwork.’” *Id.* at *8. The Ninth Circuit affirmed, concluding that the rules
 14 “plainly” were preempted because they “appl[ied] exclusively and directly to railroad activity,
 15 requiring the railroads to reduce emissions and to provide, under threat of penalties, specific reports
 16 on their emissions and inventory.” 622 F.3d at 1098. Notably, the Ninth Circuit rejected the South
 17 Coast’s argument that it could avoid ICCTA preemption by dint of the possibility that the EPA might
 18 *later* authorize the regulations under federal law. That possibility was “irrelevant” because the South
 19 Coast’s rules “did not have the force and effect of federal law, even if they might in the future.” *Id.*

20 Notwithstanding this precedent, CARB has now chosen a different path. Beginning in 2020,
 21 CARB announced its intention to adopt an “In-Use Locomotive Regulation” targeting railroads and
 22 locomotives. Compl. ¶ 73. Since that time, Plaintiffs have engaged extensively with the Agency,
 23 including by submitting oral and written comments during the rulemaking process. Compl. ¶ 74.
 24 AAR explained that CARB lacked authority to regulate railroad operations and locomotive
 25 emissions and urged the agency to return to a cooperative posture. *Id.* AAR also identified
 26 significant technical shortcomings with the proposed rules, explaining that CARB’s assumptions
 27 about the near-term availability of zero emissions technologies were unrealistic, as the Agency
 28 ignored the absence of meaningful testing data on whether uncertain technological projections (e.g.,

1 proposed battery-electric or zero-emission hydrogen locomotives) would be sufficiently safe and
 2 reliable to use at commercial scale. *See* Compl., Ex. 1 at 33-35; *see also* Compl. ¶ 75.

3 Other commentors, including ASLRRA and its members, explained that the proposed rule
 4 would have a particularly devastating impact on short line operators in the State. Class III
 5 railroads—which represent 84% of short line railroads, including all of California’s short line
 6 railroads—employ an average of just 22 people per railroad and earn an average of only \$4.7 million
 7 in annual revenue. Compl., Ex. 5 at 4. Because these railroads are small businesses that “operate[]
 8 on relatively small profit margins,” commentators explained that CARB’s regulatory proposal
 9 threatens to “significantly destabilize the state’s short line railroad industry,” *id.* at 8—likely forcing
 10 many of these companies into bankruptcy. Compl., Ex. 5 at 4-11; *see also* Declaration of Mendocino
 11 Railways (“Mendocino Decl.”) ¶ 11. CARB recognized as much, noting the possibility that some
 12 California Class III locomotive operations “would be *eliminated*” due to “the costs of the Proposed
 13 Regulation.” Compl., Ex. 6 at 143 (emphasis added).³

14 Undeterred, CARB adopted the Regulation after making only minor changes to its draft
 15 proposal—the most substantive of which added a new alternative compliance option that CARB
 16 itself recognized is not viable for freight railroads. Compl., Ex. 3 at 7. The Regulation has four
 17 primary components, all of which directly target railroad operations: the Spending Account; the In-
 18 Use Operational Requirements; the Idling Requirements; and the Reporting and Recordkeeping
 19 Requirements. Those central provisions (and a few others) are set forth below.

20 **Spending Account (§ 2478.4):** Railroads must “establish a Spending Account” into which
 21 they must make annual deposits. § 2478.4(a)-(b). To comply, railroads must “begin tracking
 22 California locomotive activity in each air district” in California (there are 35), and deposit funds into
 23 the Spending Account using a formula based upon “their locomotives’ cumulative diesel emissions,”
 24 as measured by the megawatt hours “their locomotives operated in each California air district over

25 ³ CARB asserted that short line railroads *might* be able “to pass on the costs of the Proposed
 26 Regulation to customers.” Compl., Ex. 6 at 143. But California’s short line railroads are subject to
 27 aggressive competition from trucks—not to mention serious product and geographic constraints—
 28 and have limited pricing power, making it unrealistic for them to simply pass on costs downstream.
 Compl., Ex. 5 at 9; *see also* Declaration of San Joaquin Valley Railroad (“SJVR Decl.”) ¶ 16;
 Declaration of Arizona & California Railroad Company (“ARZC Decl.”) ¶ 16; Declaration of
 California Northern Railroad Company (“CFNR Decl.”) ¶ 16.

1 the previous year.” Compl., Ex. 2 at 49; *see id.* at 98.

2 Funds deposited in the Spending Account are then subject to restrictions (the “Purchase
 3 Restrictions”). § 2478.4(d)-(g). These funds (and any interest earned therefrom) may be spent only
 4 on “the purchase, lease, or rental of” certain narrow categories of locomotives and locomotive
 5 equipment, many of which are not commercially available. § 2748.4(d). Before January 1, 2030,
 6 Spending Account funds may be spent on “Cleaner Locomotive(s), or for the Remanufacture or
 7 Repower to a Cleaner Locomotive(s),” *id.*, defined as locomotives “with exhaust emission levels
 8 that are equal to or less than Tier 4,” § 2478.3(a); *see p. 5, supra*. But manufacturers who purchase
 9 new Tier 4 locomotives will *still* incur an obligation to set aside additional funds to a Spending
 10 Account based on the emissions of those new locomotives. *See* § 2478.4(g)(2). After January 1,
 11 2030, railroads may only spend funds from these mandatory trust accounts on locomotives and
 12 accompanying infrastructure that are “zero emission” (“ZE”) or capable of operating in a zero
 13 emission configuration. § 2748.4(d). A “Zero Emission (ZE) Locomotive” is “a Locomotive that
 14 never emits *any* criteria pollutant, toxic pollutant, or greenhouse gas from an onboard source of
 15 power at any power setting, including any propulsion power that is connected to and moves with the
 16 locomotive when it is in motion.” § 2478.3(a) (emphasis added).⁴

17 **In-Use Operational Requirement (§ 2478.5):** Beginning in 2030, any locomotive that is
 18 “23 years or older”—as determined by its “Original Engine Build Date”—is banned from operating
 19 in California (subject to narrow exceptions). § 2478.5(a). The ban applies even when the
 20 locomotive’s engine has been remanufactured, § 2478.3(a) (definition of “Original Engine Build
 21 Date”), contradicting federal law, which defines a “remanufactured” locomotive as “new” and
 22 recognizes a renewed “useful life” for that locomotive. *See* 40 C.F.R. §§ 1033.101(g)(3)-(4),
 23 1033.901. Moreover, because it is infeasible for railroads to change locomotives at the border,
 24 CARB recognized this provision will compel railroads to replace their “entire [national] fleet” in
 25 order to continue operating within California. Compl., Ex. 2 at 177, 200; *see also* Compl., Ex. 6 at
 26 88 (assuming operators will need “to make their entire line haul locomotive fleet compliant”).

27
 28 ⁴ A “ZE Capable” locomotive is essentially equivalent: To qualify as ZE Capable, the operator of
 the locomotive must show “that the Locomotive was *only* Operated in a ZE Configuration when
 Operating in California during the Calendar Year.” *Id.* (emphasis added).

1 The Regulation also mandates that all locomotives built no earlier than 2030 (for switch,
 2 industrial, and passenger locomotives) or 2035 (for freight line haul locomotive engines) must
 3 operate “in a ZE Configuration at all times while in California.” § 2478.5(b)-(c). To comply, the
 4 locomotive “shall not emit any criteria pollutant, toxic pollutant, or greenhouse gas from any
 5 onboard source of power at any power setting.” § 2478.3(a). The combined effect of these
 6 provisions is to prohibit locomotives that remain within their useful life periods under federal law
 7 while dictating emissions standards for new locomotives operating in the State.

8 **Idling Requirements (§ 2478.9):** The Idling Requirements limit the amount of time a
 9 locomotive can remain stationary without turning off its engine—the same regulation category the
 10 Ninth Circuit held is preempted. *See AAR*, 662 F.3d at 1096; *see also AAR*, 2007 WL 2439499, at
 11 *3 (explaining that the preempted regulation required “the Railroads to limit idling of unattended
 12 locomotives to 30 minutes or less in certain circumstances”). Any locomotive with an “automatic
 13 engine stop/start” (“AESS”) must be “shut off no more than 30 minutes after the Locomotive
 14 becomes stationary,” save for locomotives operating in ZE configuration and a few other narrow
 15 exceptions. §§ 2478.9(a), (e). The Regulation also requires railroads to maintain their AEES
 16 capabilities, disabling the device only for maintenance. *Id.* § 2478.9(b)-(c).

17 **Reporting and Recordkeeping Requirements (§ 2478.11):** The Regulation imposes
 18 extensive reporting and recordkeeping requirements, which require railroads to develop and install
 19 an array of new technology to gather the mandatory information. The relevant provisions require
 20 that all locomotive operators submit annual reports documenting a host of particularized emissions
 21 information for non-ZE locomotives, § 2478.11(b); an itemized list of the description and location
 22 of each item purchased with the Spending Account, § 2478.11(c); and particularized power usage
 23 data for each locomotive operated in California, § 2478.11(d). To comply, the railroads must collect
 24 extensive data on the use and location of each locomotive operating in California as they move
 25 through the State’s 35 air districts. The railroads operating in the State do not currently have this
 26 capability. Many locomotives lack the necessary hardware to collect this data, particularly at the
 27 level of geographic precision the Regulation demands. BNSF Decl. ¶ 12; Mendocino Decl. ¶ 11.
 28 Railroads will also need to develop and install software to collect and collate this data, at enormous

1 additional cost and effort. *See* UP Decl. ¶ 12; Mendocino Decl. ¶ 11. And because these data
 2 collection obligations are triggered on the Regulation’s effective date, the railroads must take action
 3 before October 1, 2023 to timely comply. *See* UP Decl. ¶ 12; BNSF Decl. ¶ 14.

4 **Other Provisions:** To administer its new regulatory regime, CARB requires all
 5 “Locomotive Operators” in the State to pay a nonrefundable \$175 fee “per locomotive” (with limited
 6 exceptions for “historic locomotives” and “zero emission locomotives”). § 2478.12(b).

7 The Regulation also provides two alternative compliance options: the Alternative
 8 Compliance Plan (“ACP”) and the Alternative Fleet Milestone Option (“AFMO”). §§ 2478.7,
 9 2478.8. Neither option relieves a railroad from complying with the Regulation’s Reporting and
 10 Recordkeeping or Idling Requirements, because the alternatives may substitute only for the
 11 Spending Account and In-Use Operational Requirements. *See* §§ 2478.7(a), 2478.8(a). The AFMO
 12 allows for a transformation of an operator’s fleet in roughly five-year stages, but CARB expects this
 13 option to be viable (at best) for passenger rail, not freight rail. *See* Compl., Ex. 3 at 7-8.

14 The ACP, in turn, directs that locomotive operators may forgo compliance with the Spending
 15 Account and In-Use Operational Requirements if they develop their own plans to achieve emissions
 16 reductions that are “equivalent to or greater than the reductions that would have been achieved”
 17 through direct compliance with the regulations; in addition, emission reductions for particulate
 18 matter and NOx must be “achieved at or within three miles” of the railroad’s California operations.
 19 § 2478.7(b), (c). Thus, a railroad that pursues an ACP path would still need to overhaul its fleet to
 20 achieve the specific emissions reductions mandated by CARB—requiring “the same investment” in
 21 new technology “as that required by the Spending Account.” BNSF Decl. ¶ 16; *see also* UP Decl.
 22 ¶ 19. Moreover, the ACP still entails substantial intrusion by CARB into railroad operations: the
 23 plan must be approved by CARB’s Executive Director, with the applicant required to submit
 24 extensive information to CARB and to pay higher administrative fees. §§ 2478.7(d)-(e), 2478.12(c).
 25 An approved participant must then submit detailed annual reports to CARB, and CARB’s Executive
 26 Officer may “revoke[]” the ACP “at any time.” § 2478.7(i)(2).

27 Finally, the Regulation imposes substantial burdens on the railroads that begin even before
 28 the Regulation’s formal effective date and further accelerate over time. The Idling Requirements

1 go into force on the effective date, § 2478.9; Compl., Ex. 2 at 130; Compl., Ex. 11 at 128, requiring
 2 the railroads to take immediate steps to comply. Likewise, railroads must make their first deposits
 3 in the Spending Accounts by July 1, 2024. §§ 2478.4(a), (g); *see also* Compl., Ex. 2 at 49; Compl.,
 4 Ex. 11 at 104. The railroads will need to divert capital they were planning to spend on other priorities
 5 to make these substantial deposits next year. UP Decl. ¶ 15; BNSF Decl. ¶ 19. The Reporting and
 6 Recordkeeping Requirements likewise mandate that railroads submit their first reports on July 1,
 7 2024, but with data going back to the prior calendar year. § 2478.11(a)(5); *see also* Compl., Ex. 2
 8 at 49; Compl., Ex. 11 at 104. Because the railroads must begin collecting data as of October 1, 2023,
 9 § 2478.11, the railroads will be compelled to invest unrecoverable sums to modify their systems to
 10 collect the necessary information in advance of that date.

11 ARGUMENT

12 “To obtain a preliminary injunction, a plaintiff must establish (1) a likelihood of success on
 13 the merits, (2) a likelihood of irreparable harm in the absence of preliminary relief, (3) that the
 14 balance of equities favors the plaintiff, and (4) that an injunction is in the public interest.” *Geo Grp.,*
 15 *Inc. v. Newsom*, 50 F.4th 745, 753 (9th Cir. 2022) (en banc). “When the government is a party, the
 16 last two factors (equities and public interest) merge.” *E. Bay Sanctuary Covenant v. Biden*, 993 F.3d
 17 640, 668 (9th Cir. 2021). The preliminary injunction “factors are evaluated on a sliding scale.” *Id.*
 18 Here, all four factors strongly favor granting preliminary injunctive relief.

19 I. Plaintiffs are likely to succeed on their claims that the Regulation is unlawful.

20 The Regulation is preempted, in whole or in part, under the ICCTA and the Clean Air Act.
 21 It also violates the Dormant Commerce Clause by substantially burdening interstate transportation.

22 A. **The Regulation is preempted in full by the ICCTA.**

23 Congress adopted the ICCTA in recognition of the fact that “rail transportation” is an
 24 “intrinsically interstate form of transportation.” *Elam v. Kansas City S. Ry. Co.*, 635 F.3d 796, 804
 25 (5th Cir. 2011). “Allowing states and localities to create a variety of complex regulations governing
 26 how an instrument of interstate commerce is operated, equipped, or kept track of … would directly
 27 conflict with the goal of uniform national regulation of rail transportation.” *United States Env’t*
 28 *Prot. Agency Petition for Declaratory Ord.* (“U.S. EPA”), FD 35803, 2014 WL 7392860, at *9 (STB

1 Dec. 29, 2014). The ICCTA thus broadly preempts state and local authority to regulate railroad
 2 operations, including locomotives and their movements.

3 The ICCTA preempts regulations governing railroads in two different ways. First, the
 4 ICCTA *categorically* preempts regulations that directly target railroad operations, and thus “have
 5 the effect of ‘managing’ or ‘governing’ rail transportation.” *Delaware v. STB*, 859 F.3d 16, 19 (D.C.
 6 Cir. 2017); *accord BNSF Ry. Co.*, 904 F.3d at 760-61. The ICCTA also preempts a state law that,
 7 “as applied,” has “the effect of unreasonably burdening or interfering with rail transportation.”
 8 *Delaware*, 859 F.3d at 19. CARB’s Regulation is preempted under both tests. *See* Compl. ¶¶ 101-
 9 102. For purposes of this motion, categorical preemption establishes Plaintiffs’ likelihood of success
 10 because it presents purely legal issues. *See, e.g., Delaware*, 859 F.3d at 19; *Green Mountain R.R.*
 11 *Corp. v. Vermont*, 404 F.3d 638, 644 (2d Cir. 2005).

12 The Regulation is categorically preempted because it is not a “law of ‘general applicability’”
 13 with a mere “‘remote or incidental’ effect on rail transportation.” *BNSF Ry. Co.*, 904 F.3d at 761
 14 (quoting *AAR*, 622 F.3d at 761). To the contrary, the Regulation directly targets “railroad operators,”
 15 § 2478.1(a), with the clear purpose and effect of “managing or governing rail transportation,” *BNSF*
 16 *Ry. Co.*, 904 F.3d at 761 (quotation marks omitted) (holding that law requiring railroads to collect
 17 fee from shippers of hazardous material would be preempted because it applied to shippers “only if
 18 they ship by rail”⁵); *Norfolk S. Ry. v. City of Alexandria*, 608 F.3d 150, 160 (4th Cir. 2010) (state
 19 regulation cannot “discriminate against rail carriers”); *N.Y. Susquehanna v. W. Ry. v. Jackson*, 500
 20 F.3d 238, 254 (3d Cir. 2007) (“[F]or a state regulation to pass muster, it must address state concerns
 21 generally, without targeting the railroad industry.”).

22 This issue is beyond fair debate. Even the name of the Regulation—the “In-Use Locomotive
 23 Regulation”—shows that it targets railroad operations, and CARB has described the Regulation as
 24 intended to “achieve emission reductions from Locomotives Operating in California.” Compl., Ex.
 25 8 at 1. Analysis of individual sections of the Regulation only confirms the point: the Regulation
 26 creates a complex regulatory apparatus to control critical railroad functions and management

27
 28 ⁵ The Ninth Circuit ultimately held that the provision was “protect[ed] from preemption” by a
 separate federal statute that is not applicable here. *Id.* at 761.

1 decisions, ranging from the locomotives that railroads may purchase and use, to how those
 2 locomotives operate, all supported by burdensome reporting requirements that will, on their own,
 3 require many millions of dollars to implement.

4 **Spending Account (§ 2478.4) and Administrative Fee (§ 2478.12):** The Regulation
 5 requires railroads—but not trucking or other transportation companies—to make significant annual
 6 expenditures that are subject to CARB’s direction. *See* Compl., Ex. 11 at 82 (describing the
 7 Spending Account as “a regulatory concept developed to address the unique circumstances of the
 8 railroad industry”). These payment requirements take two forms: the “Spending Account,” which
 9 imposes charges based on the operation of a locomotive within California, and a yearly
 10 administrative fee charged to the locomotive operator. §§ 2478.4, 2478.12. Both provisions directly
 11 target railroads, and both are preempted by the ICCTA.

12 The Spending Account is an especially clear ICCTA violation. First, the financial burden
 13 on railroads is enormous: for example, the two Class I railroads operating in California (Union
 14 Pacific and BNSF) estimate they will collectively have to deposit about *\$1.5 billion annually* into
 15 their Spending Accounts. *See* BNSF Decl. ¶ 19; UP Decl. ¶ 16. Second, the provisions are designed
 16 to interfere with how railroads manage their locomotive fleets by dictating that funds will be spent
 17 only on CARB-approved locomotives, rail equipment, or infrastructure. § 2478.4(d). Although
 18 CARB claims that the “Spending Account” structure grants railroads flexibility, Compl., Ex. 2 at
 19 99, the Regulation hijacks railroads’ ability to make their own decisions about capital expenditures,
 20 forcing them to spend huge sums purchasing locomotives and other assets that CARB wants
 21 operators to prioritize—including locomotives that railroads believe are not commercially viable.
 22 *See* BNSF Decl. ¶¶ 6, 19; UP Decl. ¶¶ 16, 21. As a result, the Regulation will have a disruptive
 23 impact on the railroads’ allocation of resources and their ability to execute planned capital projects.
 24 BNSF Decl. ¶ 19; UP Decl. ¶ 16; Mendocino Decl. ¶ 16.

25 **In-Use Operational Requirement (§ 2478.5):** The Regulation imposes an effective ban on
 26 the operation of certain locomotives in the State—locomotives that continue to comply with all
 27 federal regulations—simply because those locomotives have been in operation for 23 years since
 28 their original engine build date. *See* § 2478.5; p. 9, *supra*. It is difficult to imagine a more direct

1 interference with railroad operations. Confirming the point, CARB understands that its Regulation
 2 will impact fleets of all North American Class I railroads on a nationwide basis, since it is infeasible
 3 for interstate networks like the Class I railroads to maintain separate state-specific fleets. *See*, p. 9,
 4 *supra*. Indeed, the In-Use Locomotive Requirement appears to be driven by CARB’s disagreement
 5 with federal law, as CARB rationalized this provision by reference to the supposed inadequacy of
 6 federal regulations that let railroad operators “remanufacture” older locomotives. Compl., Ex. 2 at
 7 19. To state the obvious, CARB’s disagreement with the federal law provides no basis for it to
 8 sidestep federal preemption.⁶ If the rule were otherwise, each state could adopt its own view of
 9 effective locomotive regulation, leading to exactly the type of “patchwork of regulation” that the
 10 ICCTA was designed to prevent. *Fla. E. Coast Ry. v. City of W. Palm Beach*, 266 F.3d 1324, 1338
 11 (11th Cir. 2001); *cf. S. Pac. Co. v. Ariz. ex rel. Sullivan*, 325 U.S. 761, 774 n.4 (1945) (noting the
 12 unworkability of competing state standards for locomotives).

13 **Idling Requirements (§ 2478.9):** The Regulation’s restrictions on train idling are materially
 14 indistinguishable from the South Coast regulations that the Ninth Circuit in *AAR* held were
 15 preempted by the ICCTA. *See* 662 F.3d at 1098. As with those invalidated rules, the Regulation
 16 “limits the permissible amount of emissions from idling trains,” *id.* at 1096, by mandating (subject
 17 to limited exceptions) that railroad operators shut off their locomotives within 30 minutes of the
 18 locomotive becoming stationary. § 2478.9(a); p. 10, *supra*. This direct regulation of railroad
 19 operations once again is “plainly” preempted by the ICCTA. *AAR*, 662 F.3d at 1098; *see also U.S.*
 20 *EPA*, 2014 WL 7392860, at *8 (recognizing that state and local regulators lack authority “to decide
 21 for the railroads what constitutes unnecessary idling”).

22 CARB has suggested that the Idling Requirements are unobjectionable because they
 23 supposedly are “consistent with” existing EPA regulations. Compl., Ex. 2 at 21, 69. That statement
 24 is impossible to square with CARB’s rationale for adopting this provision: namely, its desire “to
 25

26 ⁶ CARB also failed to acknowledge the significant benefits of remanufacturing. As *AAR*
 27 explained, remanufacturing leads to increased fuel efficiency, reduced emissions, and significant
 28 recycling benefits—all while improving the locomotives’ reliability and effectiveness. Compl., Ex.
 1 at 12-13. CARB, in fact, supported EPA’s adoption of the remanufacturing regulations when they
 were developed and promulgated, explaining that it “fully support[ed] the direction that U.S. EPA
 is taking to control emissions from” locomotives. *Id.* at 14 n.36.

1 strengthen enforcement and limit unnecessary locomotive idling.” *Id.* at 23. In fact, CARB’s
 2 proposed regulation places significant additional burdens on locomotive owners and operators—
 3 unlike the existing federal rule, which focuses on the original equipment manufacturer or
 4 remanufacturer. *See* 40 C.F.R. § 1033.115(g). Regardless, there is no exception from ICCTA
 5 preemption for regulations that supposedly parallel or supplement federal law. The ICCTA
 6 expressly reserves the entire field of locomotive regulation to the federal government. And “[w]here
 7 Congress has occupied an entire field … even complementary state regulation is impermissible.”
 8 *Arizona v. United States*, 567 U.S. 387, 401 (2012) (holding that a law “add[ing] a state-law penalty
 9 for conduct proscribed by federal law” was preempted because it “intrudes on [a] field … in which
 10 Congress has left no room for States to regulate”).

11 **Reporting and Recordkeeping Requirements (§ 2478.11):** The Reporting and
 12 Recordkeeping Requirements exist to facilitate the Spending Account (by providing the emissions
 13 inputs into CARB’s formula, *see* Compl. Ex. 11 at 129), which is itself preempted under the ICCTA.
 14 *See* p. 14, *supra*. Moreover, as with the Regulation’s Idling Requirements, these requirements
 15 closely mirror the provisions that the Ninth Circuit held violate the ICCTA. *See AAR*, 622 F.3d at
 16 1096 (regulations imposed “various reporting requirements, backed by threat of penalties” including
 17 an inventory of locomotive emissions). Under the Regulation, locomotive operators must collect
 18 extensive data on the use and location of each locomotive operating in California, requiring railroads
 19 to develop and install new technology on many locomotives. *See* p. 10, *supra*. And because the
 20 provision applies to any locomotive operated in California for any portion of the year, § 2478.11(b),
 21 it will force railroads to ensure that *any* locomotive in their fleet that may enter California at any
 22 point is equipped with this tracking technology, even if the locomotive is not ordinarily operated in
 23 the State. *See* BNSF Decl. ¶ 15; UP Decl. ¶ 13. As the STB has explained, such state-specific
 24 recordkeeping obligations are inconsistent with the ICCTA. *See U.S. EPA*, 2014 WL 7392860, at
 25 *9 (recognizing that requiring “railroad employees to comply with … recordkeeping rules for each
 26 jurisdiction … would likely result in an unworkable variety of regulations”).

27 In sum, CARB’s Regulation is impossible to square with the ICCTA. The Regulation
 28 directly targets railroads in a self-described effort to transform locomotive fleets and operations both

1 within and beyond California. That is plainly impermissible. *See AAR*, 622 F.3d at 1098. CARB
 2 effectively conceded as much in its Final Statement of Reasons, as the primary defense it put forward
 3 against ICCTA preemption is that CARB “anticipates seeking, and receiving, authorization from
 4 U.S. EPA,” in the form of a section 209(e)(2) waiver, which CARB contends would avoid a conflict
 5 with the ICCTA. *See Compl.*, Ex. 11 at 21, 35. CARB is wrong about that. *See U.S. EPA*, 2014
 6 WL 7392860, at *7. But regardless, because EPA has *not* authorized the Regulation, CARB’s
 7 speculation that EPA *might* do so *someday*—in the face of significant legal challenges—provides
 8 no basis for CARB to defend and enforce the Regulation *now*. *See AAR*, 622 F.3d at 1098.

9 Nor do either of CARB’s putative “alternative” compliance options avoid any of these
 10 preemption problems. To start, both programs leave unchanged the onerous Idling and Reporting
 11 and Recordkeeping Requirements, which apply immediately. *See* p. 11, *supra*. As for the remaining
 12 requirements, even CARB admits that the AFMO option is not viable for freight rail. *See id.* The
 13 ACP, in turn, continues to subject railroads to burdensome mandates that directly restrict their
 14 operations. After all, the ACP requires railroads to achieve the *same or greater* reductions in
 15 emissions in the five-year period following implementation of the Regulation that CARB projects
 16 from its mandates, and participation in the program remains subject to CARB oversight.
 17 §§ 2478.7(b), (e)-(l). Because the railroads must still make extensive upgrades to their fleets to
 18 further CARB’s policy objectives, the ACP has the “effect of ‘managing’ or ‘governing’ rail
 19 transportation.” *Delaware*, 859 F.3d at 19. In any event, the mere existence of “alternative options”
 20 does not mitigate the preemption problem. The South Coast regulation at issue in *AAR* provided “a
 21 series of alternative options for achieving” emissions goals—a factor that did not change the Ninth
 22 Circuit’s preemption analysis. 622 F.3d at 1096.

23 The ICCTA accordingly preempts the Regulation in full, and the Court need go no further
 24 in finding that Plaintiffs have shown a likelihood of success on the merits.

25 **B. The Spending Account and In-Use Requirements are also preempted by the
 26 Clean Air Act.**

27 The Clean Air Act precludes any state “standard or other requirement relating to the control
 28 of emissions from ... [n]ew locomotives or new engines used in locomotives.” 42 U.S.C.

1 § 7543(e)(1). This statute preempts the Spending Account and In-Use Operational Requirements.

2 **1. The In-Use Operational Requirements are preempted.**

3 The In-Use Operational Requirements provision is preempted by Section 209(e) of the Clean
 4 Air Act. To begin, CARB’s bar on operating a locomotive older than 23 years (from the original
 5 engine build date), unless the locomotive falls below specified emissions levels or lifetime energy
 6 usage, is an attempt to enforce a standard or other requirement relating to locomotive emissions
 7 control. Indeed, this requirement simply bans the in-state operation of locomotives that CARB
 8 believes to be excessive emitters. CARB does not hide that it selected the age of a locomotive as a
 9 proxy for emissions. It states that its 23-year age limit “is necessary to prevent older, higher-
 10 polluting locomotives from continuing to operate in California despite the availability of cleaner
 11 locomotive emission technologies.” Ex. 2 at 109.

12 It makes no difference that CARB chose a proxy for emissions rather than directly enforcing
 13 an emission standard. As the Ninth Circuit recently reiterated, “States and localities can’t skirt the
 14 text of broad preemption provisions by doing indirectly what Congress says they can’t do directly.”
 15 *Cal. Rest. Ass’n v. City of Berkeley*, 65 F.4th 1045, 1056 (9th Cir. 2023). In the context of the Clean
 16 Air Act’s analogous preemption provision for motor vehicles, the Supreme Court explained that the
 17 statute preempts all sorts of “enforcement techniques” and “methods of standard enforcement.”
 18 *Engine Mfrs. Ass’n v. S. Coast Air Quality Mgmt. Dist. (EMA)*, 541 U.S. 246, 253 (2004); *see Pac.*
 19 *Merch. Shipping Ass’n*, 517 F.3d at 1114 (“the means of compliance are irrelevant”). Banning a
 20 proxy for emissions is one such enforcement technique.

21 Nor is the 23-year cap spared by section 209(e)(1)’s language referring to standards and
 22 requirements related to “new” locomotives and engines. First, the Regulation applies even to
 23 locomotives that are “new” under federal law because CARB starts the 23-year clock from the
 24 original engine’s assembly *without regard to any subsequent remanufacture*. *See* § 2478.3(a). By
 25 contrast, federal law provides that “[a] locomotive or engine also becomes new if it is
 26 remanufactured or refurbished,” and recognizes that such locomotives are entitled to an additional
 27 useful life period. 40 C.F.R. §§ 1033.101(g)(3)-(4), 1033.901. CARB’s ban on these federally
 28 permitted locomotives during their useful life thus qualifies as a requirement “relating to the control

1 of emissions from ... [n]ew locomotives.” 42 U.S.C. § 7543(e)(1); p. 5, *supra*. Second, this
 2 requirement would be preempted even if it could be characterized as applying only to non-“new”
 3 locomotives and engines, because California has neither applied for nor received the requisite waiver
 4 under Section 209(e)(2). *See* p. 6, *supra*; *see* Compl., Ex. 11 at 22 (stating that CARB “anticipates
 5 seeking” a waiver at some undisclosed time in the future).

6 The subsequent provisions of the In-Use Operational Requirements are also preempted.
 7 They mandate that locomotives built after a specified year must operate “in a ZE Configuration at
 8 all times while in California”—setting 2030 as the year for switch, industrial, and passenger
 9 locomotives and 2035 as the year for freight line haul locomotive engines. *See* § 2478.5(b)-(c).
 10 This is an undisguised ban on emissions for these locomotives, which is preempted by Section
 11 209(e). *See Pac. Merchant Shipping Ass'n*, 517 F.3d at 1114.

12 **2. The Spending Account sets “standard[s] or other requirement[s]”
 13 relating to the control of emissions from new locomotives.**

14 The Spending Account provision is likewise preempted under section 209(e) of the Clean
 15 Air Act in two distinct ways. First, the Funding Requirement imposes a “requirement” relating to
 16 emissions controls by effectively charging railroads to operate in California based on the emissions
 17 from their locomotives. Second, the Purchase Restrictions set emissions-related standards or
 18 requirements on new locomotive purchases in the State.

19 Beginning with the Funding Requirement, the command to locomotive operators that they
 20 “shall” use a formula to calculate their “funding requirement for each Locomotive” and “shall”
 21 deposit funds into a Spending Account, § 2478.4(g)(2), fits within the plain meaning of a “standard
 22 or other requirement,” 42 U.S.C. § 7543(e)(1). *See EEOC v. BNSF Ry. Co.*, 902 F.3d 916, 925 (9th
 23 Cir. 2018) (defining “require” as “[s]omething that must be done” (quoting Black’s Law Dictionary
 24 (10th ed. 2014)). The Funding Requirement also “relat[es] to the control of emissions” from
 25 locomotives. “The goal” of the Spending Account “is to increase uptake of cleaner diesel
 26 locomotives and zero-emission locomotives.” Compl., Ex. 9 at 111. To further that goal, the
 27 Regulation charges locomotives operating in the State based on their emissions levels, where “[t]he
 28 amount deposited in the account is calculated by using the locomotive’s annual usage in megawatt

1 hours (MWh) and the locomotive’s emission factors.” Compl., Ex. 2 at 20. The Funding
 2 Requirement thus attaches “liability” for past emissions, which is “a potent method of governing
 3 conduct and controlling policy.” *Riegel v. Medtronic, Inc.*, 552 U.S. 312, 324 (2008).

4 The Purchase Restrictions in § 2478.4(d) likewise are preempted as an “attempt to enforce”
 5 a “standard or other requirement relating to the control of emissions.” 42 U.S.C. § 7543(e)(1). The
 6 Supreme Court has “clarified the breadth of the word ‘standard.’” *Jensen Family Farms, Inc. v.*
 7 *Monterey Bay Unified Air Pollution Control Dist.*, 644 F.3d 934, 941 (9th Cir. 2011). In interpreting
 8 section 209(a) of the Clean Air Act (governing preemption for motor-vehicle emission standards),
 9 the Supreme Court determined that a “standard” means an established “criteria” according to which
 10 “the vehicle or engine must not emit more than a certain amount of a given pollutant, must be
 11 equipped with a certain type of pollution-control device, or must have some other design feature
 12 related to the control of emissions.” *EMA*, 541 U.S. at 253. The Court further held that “purchase
 13 restrictions” directed to buyers qualify as a “means of enforcing standards.” *Id.* at 253-54. Thus,
 14 because “[a] command, accompanied by sanctions, that certain purchasers may buy only vehicles
 15 with particular emission characteristics is ...an ‘attempt to enforce’ a ‘standard,’” such state-law
 16 purchase mandates are preempted by the Clean Air Act. *Id.* at 255.

17 Under the reasoning of EMA, the Purchase Restrictions in § 2478.4(d) of the Regulation are
 18 impermissible attempts to enforce “standard[s] ... relating to the control of emissions” from new
 19 locomotives, 42 U.S.C. § 7543(e)(1). The Regulation dictates the new locomotives that operators
 20 may purchase with the funds conscripted by the State based on explicit emissions criteria—initially,
 21 locomotives that satisfy the State’s emissions-based definition of “Cleaner Locomotives,”⁷ and
 22 ultimately only “ZE” or “ZE Capable” Locomotives that operate without emitting any pollutants or
 23 greenhouse gases, *see* § 2478.3(a), which is far more restrictive than any federal emissions standard,
 24 *see* 40 C.F.R. § 1033.101. These purchase mandates are backed by penalties for non-compliance,
 25 *see* § 2478.16, and are intended to dictate the emissions standards for new locomotives purchased
 26

27 ⁷ The fact that this requirement is defined by reference to the federal Tier 4 standard does not save
 28 the provision from preemption. CARB is barred not only from adopting its own emissions standards,
 but also from “attempt[ing] to enforce” any standard relating to emissions control from new
 locomotives, which the purchase requirement plainly does. 42 U.S.C. § 7543(e)(1)(B).

1 by railroads operating in California. *See* Compl., Ex. 2 at 98. The Purchase Restrictions are thus
 2 preempted. *See Am. Auto. Mfrs. Ass'n v. Cahill*, 152 F.3d 196, 200 (2d Cir. 1998) (holding that “a
 3 requirement that a particular percentage of vehicle sales be [zero-emission vehicles] has no purpose
 4 other than to effect a general reduction in emissions” and is therefore preempted); *Ass'n of Int'l*
 5 *Auto. Mfrs., Inc. v. Comm'r, Mass. Dep't of Envtl. Prot.*, 208 F.3d 1, 6 (1st Cir. 2000) (same).

6 **C. The Regulation violates the Dormant Commerce Clause.**

7 The Regulation also violates the Dormant Commerce Clause. The Dormant Commerce
 8 Clause is a “limitation on state power” arising from the negative implication of the Commerce
 9 Clause, which reserves the power to regulate interstate commerce to the federal government. *Nat'l*
 10 *Ass'n of Optometrists & Opticians v. Harris*, 682 F.3d 1144, 1147 (9th Cir. 2012). The Supreme
 11 Court has repeatedly applied this doctrine to invalidate “certain state regulations on instrumentalities
 12 of interstate transportation—trucks, trains, and the like.” *Nat'l Pork Producers Council v. Ross*, 143
 13 S. Ct. 1142, 1158 n.2 (2023). In these cases, because “a lack of national uniformity would impede
 14 the flow of interstate goods,” the Court has held that Commerce Clause “pre-empts [that] entire field
 15 from state regulation.” *Id.* (quoting *Exxon Corp. v. Governor of Maryland*, 437 U.S. 117, 128 (1978)
 16 (emphasis omitted)); *see id.* at 1164 n.4 (plurality op.) (noting that “a majority [of the Supreme
 17 Court] agrees” that cases that “seek to protect the instrumentalities of interstate transportation” lie
 18 in the “heartland” of Dormant Commerce Clause precedent).

19 For example, in *Southern Pacific Co. v. Arizona ex rel. Sullivan*, 352 U.S. 761 (1945), the
 20 Supreme Court held that an Arizona law prohibiting the in-state operation of trains of a certain length
 21 ran afoul of the Dormant Commerce Clause. *Id.* at 781-82. As the Court explained, state-by-state
 22 regulation would require “breaking up and reassembling long trains at the nearest terminal points
 23 before entering and leaving that regulating state.” *Id.* at 775. It would thus “serious[ly] imped[e]
 24 the free flow of commerce,” leading to the “obstructi[on] to interstate train operation,” and a
 25 “seriously adverse effect on transportation efficiency and economy.” *Id.* at 775, 781.

26 Similarly, the Ninth Circuit has instructed that, where an activity is “inherently national or
 27 requires a uniform system of regulation,” a state law violates the Dormant Commerce Clause when
 28 it “impose[s] significant burdens on interstate commerce as a consequence of inconsistent

1 regulation” of the activity. *Ass’n des Eleveurs de Canards et d’Oies du Quebec v. Harris*, 729 F.3d
 2 937, 952 (9th Cir. 2013). As the court has recognized, a “classic example of this type of [invalid]
 3 regulation is one that imposes significant burdens on interstate transportation.” *Nat’l Ass’n of
 4 Optometrists*, 682 F.3d at 1148. Thus, in *Union Pacific Railroad Co. v. California Public Utilities
 5 Commission*, 346 F.3d 851 (9th Cir. 2003), the Ninth Circuit invalidated California’s regulation of
 6 performance-based safety standards for trains. The court explained that, “if California can require
 7 the Railroads to develop and to implement performance-based standards, so can every other state,
 8 and there is no guarantee that the standards will be similar. The effect of such a patch-work
 9 regulatory scheme would be immense.” *Id.* at 871.

10 The reasoning of these decisions fully applies here. As discussed above, railroads’ only
 11 options for complying with the Regulation are to change locomotives at the California border, or to
 12 replace their entire nationwide fleets. *See* p. 9, *supra*. Either possibility imposes an unsustainable
 13 burden on the flow of interstate goods. *See Nat’l Pork Producers*, 143 S. Ct. at 1158 n.2; *S. Pac.*,
 14 325 U.S. at 781-82; *Union Pac.*, 346 F.3d at 871-72. The burden is compounded by the risk of
 15 imitation: if California is permitted to enforce the Regulation, other states will likely follow suit
 16 with their own regulations dictating design requirements for locomotives, creating a hugely
 17 disruptive “patch-work regulatory scheme.” *Union Pac.*, 346 F.3d at 871. The Dormant Commerce
 18 Clause forbids such state-level interference with an inherently interstate form of transportation.

19 **II. Plaintiffs’ members will suffer immediate, irreparable harm absent an injunction.**

20 If Defendants are not preliminarily enjoined from enforcing the Regulation, Plaintiffs’
 21 members will suffer imminent, irreparable harm. Plaintiffs’ members will need to disrupt their own
 22 operational plans and investments to devote vast expenditures to compliance efforts. Those
 23 expenditures and compliance efforts are highly burdensome, inherently irreparable, and threaten the
 24 very existence of short line railroads in the State.

25 Absent an injunction, the railroads will face upheaval in the coming weeks and months. The
 26 railroads must upend their spending and budget priorities and shift their time and resources to an
 27 entirely new set of projects. Before the Regulation even goes into effect, the railroads must start
 28 installing new hardware and software to comply with the Reporting and Recordkeeping

1 Requirements. *See* BNSF Decl. ¶ 14 (explaining that BNSF needs “to immediately begin installing
 2 the new technology and building this new back-end infrastructure”); UP Decl. ¶¶ 11-13 (explaining
 3 that Union Pacific does not currently have the capacity to track MWh generation by air district).
 4 Union Pacific estimates that this project alone will cost about \$264 million—money it must start to
 5 spend right away. UP Decl. ¶ 12. Because these funds would be spent on technology tailored
 6 specifically to CARB’s reporting obligations that are otherwise unneeded, the technology provides
 7 no independent value to the railroads. BNSF Decl. ¶ 17; UP Decl. ¶ 14. Moreover, the railroads
 8 must take certain portions of their fleet out of operation while this technology is being installed,
 9 leading to service disruptions. BNSF Decl. ¶ 16.

10 In addition, the railroads must reprioritize their current budgets and project plans to withdraw
 11 the necessary deposits for the Spending Account. As Union Pacific explained, to comply with the
 12 Spending Account mandate, it “must immediately divert capital it was planning to spend on other
 13 projects and/or priorities designed to,” for example, “enhance safety [and] upgrade and/or reinforce
 14 track”—projects identified by Union Pacific as “priorities needed to manage a safe and efficient
 15 railroad company.” UP Decl. ¶ 16; *see also* BNSF Decl. ¶ 19 (likewise explaining that the
 16 impending deposit obligation will force BNSF to shift money “it was otherwise planning to spend
 17 on important infrastructure and maintenance across its nationwide network”). Again, these changes
 18 must be made in the coming months to allow the railroads to deposit potentially millions of dollars
 19 each (for the Class I railroads) next year. BSNF Decl. ¶ 19; UP Decl. ¶ 16.

20 All of these harms are both imminent and irreparable. First, the economic losses that
 21 Plaintiffs’ members will suffer are inherently irreparable because no railroad will be able to recover
 22 damages from CARB or its officers under the Eleventh Amendment. *See, e.g., Rocky Mountain*
23 Farmers Union v. Corey, 913 F.3d 940, 950 (9th Cir. 2019) (holding that CARB’s officers could
 24 not be sued for damages). Under Ninth Circuit precedent, when sovereign immunity bars any
 25 “adequate legal remedy” for the harm the plaintiffs will experience, the economic loss is
 26 “irreparable.” *E. Bay Sanctuary*, 993 F.3d at 677 (citation omitted); *see also Blue Lake Rancheria*
27 v. Lanier, 106 F. Supp. 3d 1134, 1140-41 (E.D. Cal. 2015) (Mendez, J.) (a plaintiff’s inability “to
 28 obtain damages … because of the state’s [Eleventh Amendment] immunity” renders economic loss

1 *per se* “irreparable”); *Ass’n for Accessible Medicines v. Bonta*, 562 F. Supp. 3d 973, 987-88 (E.D. Cal. 2021) (identifying irreparable harm resulting from the “huge sums of money” an association’s members were forced to pay to comply with a law, and explaining that “monetary injury can be irreparable when Eleventh Amendment sovereign immunity prevents a plaintiff from recovering damages”); *April in Paris v. Becerra*, 494 F. Supp. 3d 756, 769 (E.D. Cal. 2020) (same).

6 Second, even apart from the issue of sovereign immunity, the Regulation’s direct
 7 interference with railroad operations and the forced diversion of resources will result in irreparable
 8 injury. Once the railroads prevail, there will be no way to unwind the clock to remedy service
 9 disruptions or the lost time and resources that the railroads were not able to spend on the projects
 10 they have identified as most pressing. *See* BNSF Decl. ¶ 17; UP Decl. ¶ 16; Mendocino Decl. ¶ 16.
 11 Such a diversion of resources and the loss of investment opportunities is irreparable harm. *See, e.g.*,
 12 *Se. Pa. Transp. Authority v. Pa. Public Utility Comm’n*, 210 F. Supp. 2d 689, 726 (E.D. Pa. 2002)
 13 (agreeing that Amtrak would be irreparably harmed where, among other reasons, it would be “forced
 14 to divert resources toward paying” governmental assessments); *see also Bay Sanctuary Covenant*,
 15 993 F.3d at 677 (holding that a forced change in an organization’s programs is an irreparable injury);
 16 *Centro Legal de la Raza v. Exec. Off. of Immigr. Rev.*, 524 F. Supp. 3d 919, 977 (N.D. Cal. 2021)
 17 (irreparable harm established where the “plaintiffs have been forced to divert resources away from
 18 their core programs to address the new policy” (quotation marks and brackets omitted)).

19 Third, although the immediate obligations imposed by the Regulation will be onerous for all
 20 railroads in the State, they pose an existential threat to the short line railroads. As Mendocino
 21 Railway explains, making the required technology upgrades to its fleet “would be cost prohibitive.”
 22 Mendocino Decl. ¶ 11. Because Mendocino Railway “is a small Class III carrier with very narrow
 23 margins,” it may “be forced into bankruptcy” if “the Regulation takes effect while this litigation
 24 proceeds.” *Id.* CARB acknowledged that some short line railroads may be “eliminated” due to the
 25 high compliance costs of the Regulation. *See* pp. 8, *supra*; Compl., Ex. 6 at 143. This “threat of
 26 being driven out of business” is a textbook example of irreparable injury that warrants preliminary
 27 injunctive relief. *hiQ Labs, Inc. v. LinkedIn Corp.*, 31 F.4th 1180, 1188 (9th Cir. 2022).

28 Finally, where a state law “is unconstitutional on its face, an injunction prohibiting its

1 enforcement is proper.” *Ass’n for Accessible Medicines*, 562 F. Supp. 3d at 988; *see also United*

2 States v. Arizona, 641 F.3d 339, 366 (9th Cir. 2011) (“We have “stated that an alleged constitutional

3 infringement will often alone constitute irreparable harm”). Here, Plaintiffs are likely to prevail in

4 their claims that the Regulation is preempted by federal law and violates the Commerce Clause.

5 **III. The balance of hardships and public interest favor injunctive relief.**

6 In cases against the government, the court “consider[s] the balance of equities and public

7 interest together.” *California v. Azar*, 911 F.3d 558, 580 (9th Cir. 2018); *see also Drakes Bay Oyster*

8 *Co. v. Jewell*, 747 F.3d 1073, 1092 (9th Cir. 2014) (“When the government is a party, these last two

9 factors merge.”). These factors weigh strongly in favor of granting the injunction.

10 First, “the public interest favors applying federal law correctly.” *Small v. Avanti Health Sys.,*

11 LLC, 661 F.3d 1180, 1197 (9th Cir. 2011). As a result, there is no public interest in enforcing a law

12 that is preempted. *See Nat'l City of Indiana v. Boutris*, 2003 WL 21536818, at *7 (E.D. Cal. July

13 2, 2003) (the public interest was “served by enjoining the enforcement of the [preempted] provisions

14 of state law”) (alteration in original). Thus, the “plaintiffs’ likelihood of success as to preemption

15 compels finding in favor of plaintiffs” with respect to the public interest too. *April*, 494 F. Supp. 3d

16 at 771; *see Ass’n for Accessible Medicines*, 562 F. Supp. 3d at 989 (similar regarding a dormant

17 Commerce Clause claim).

18 Second, a preliminary injunction would be in the public interest because the Regulation

19 adopts a flawed, technically unrealistic approach to reducing locomotive emissions and improving

20 air quality in the State. These goals are undeniably worthy, and Plaintiffs’ members have already

21 made significant investments to achieve them. *See, e.g.*, Compl., Ex. 1 at 3-4; BNSF Decl. ¶¶ 5-6;

22 UP Decl. ¶ 4. But the regulatory mandates imposed by CARB are untested and unrealistic. They

23 do not provide a viable path forward for achieving environmental goals while maintaining a

24 functioning freight-rail service in the State. To the contrary, they will force some railroads to

25 abandon their productive efforts to reduce emissions in order to reallocate funds. SNR Decl. ¶ 13.

26 This defies the public interest and thus favors maintaining the status quo.

27 **CONCLUSION**

28 The Court should grant Plaintiffs’ motion for a preliminary injunction.

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2 Respectfully submitted,
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